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The Honorable Frederick P. Corbit
Chapter: 7

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9 **UNITED STATES BANKRUPTCY COURT**
10 **EASTERN DISTRICT OF WASHINGTON**

11 In Re:

12 GIGA WATT, INC.,

13 Debtor.

14 No. 18-03197-FPC7
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**OPPOSITION TO TRUSTEE'S
MOTION TO STRIKE
DECLARATION OF ARMAND J.
KORNFELD**

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18 The Trustee's Motion to Strike the Declaration of Armand J. Kornfeld (ECF 980)
19 should be denied. The Trustee confuses expert opinion for legal argument. The two
20 are not the same. Here, Mr. Kornfeld opines, based on his training and experience, that
21 the conduct of Perkins and its counsel in filing the Third-Party Complaint in the
22 Trustee's adversary proceeding against Perkins was in good faith and objectively
23 reasonable under the circumstances. *See* ECF 978 ¶ 21. Whether conduct is reasonable
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OPPOSITION TO TRUSTEE'S MOTION TO STRIKE
DECLARATION OF ARMAND J. KORNFELD - 1

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1 and/or in good faith under the circumstances is an issue of fact, not law, and an expert
2 may certainly opine, based on training, experience, and industry standards, that
3 challenged conduct is reasonable or in good faith. *See e.g., Hangarter v. Provident Life*
4 & Accident Ins. Co.

5 , 373 F.3d 998, 1016–17 (9th Cir. 2004) (observing that “expert
6 witness for [the defendant] was permitted to testify” to “*the issue of bad faith*” by
7 showing that the defendant relied on both “Iowa law” and “industry practice” in
8 engaging in challenged conduct) (quoting *Ford v. Allied Mut. Ins. Co.*, 72 F.3d 836, 841
9 (10th Cir. 1996)).

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11 Moreover, Mr. Kornfeld’s expert opinion testimony that Perkins and its counsel
12 acted in an objectively reasonable fashion under the circumstances is relevant to the
13 Trustee’s Motion for Sanctions. Specifically, civil contempt “is a severe
14 remedy.” *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019). Thus, the standard to
15 impose civil contempt is high and requires a finding that there was no objectively
16 reasonable basis for engaging in the challenged conduct:

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19 [T]he Supreme Court has set a significantly high hurdle for when
20 it [civil contempt] is imposed. *Taggart*, 139 S. Ct. at 1802. The
21 standard is rooted in the concept that “basic fairness requires that
22 those enjoined receive explicit notice of what conduct is outlawed
23 before being held in civil contempt.” Thus, “civil contempt may be
24 appropriate if there is no objectively reasonable basis for
concluding that the creditor’s conduct might be lawful.”

1 *In re Taggart*, 980 F.3d 1340, 1347 (9th Cir. 2020) (citing *Taggart*, 139 S. Ct. at 1799-
2 1802) (cleaned up and emphasis added). Put differently, only “when there [i]s no ‘fair
3 ground of doubt’ as to whether the subject order barred the conduct the violator engaged
4 in, the court has the discretion to hold the violator in contempt of court.” *In re Moo*
5 *Jeong*, No. 6:19-BK-10728-WJ, 2020 WL 1277575, at *4 (B.A.P. 9th Cir. Mar. 16,
6 2020) (quoting *Taggart*, 139 S. Ct. at 1804). Critically, the “objectively reasonable”
7 standard imposed by the Supreme Court in *Taggart* applies to civil contempt as a
8 sanction for violating the automatic stay. *See id.*, at *4 and n.3 (applying *Taggart*
9 standard to civil contempt for stay violation).

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12 Therefore, Mr. Kornfeld’s declaration goes directly to a factual finding that must
13 first be made before civil contempt can be imposed: namely, whether the alleged
14 violator acted in an objectively reasonable fashion and there was “fair ground [to]
15 doubt” that filing a pleading in the adversary proceeding would be improper.
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19 Mr. Kornfeld is an extremely well-respected bankruptcy lawyer with decades of
20 experience. He has reviewed the conduct and circumstances and, based on his training
21 and experience, provides the opinion of an experienced practitioner that the conduct at
22 issue was reasonable and proper. An expert opinion may embrace an ultimate issue—
23 in this case whether filing the Third-Party Complaint was reasonable under the
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1 circumstances—and is not objectionable on that ground. Fed. R. Evid. 704(a);
2 *Hangarter*, 373 F.3d at 1016–17 (same).
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4 The Trustee’s Motion to Strike Mr. Kornfeld’s Declaration should be denied.
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6 DATED this 19th day of January, 2023.
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8 BYRNES KELLER CROMWELL LLP
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2 CERTIFICATE OF SERVICE
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8 I hereby certify that on this 19th day of January, 2023, I electronically filed the
9 foregoing with the Clerk of the Court using the CM/ECF System, which in turn
10 automatically generated a Notice of Electronic Filing (NEF) to all parties in the case
11 who are registered users of the CM/ECF system. The NEF for the foregoing specifically
12 identifies recipients of electronic notice.
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